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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1279

MARY ELIZABETH BLETHROADE SUTT, et al.,
Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY, et al.,
Respondents.

No. _____

LAKESIDE HOSPITAL ASSOCIATION, et al.,
Petitioners,

vs.

THE FIRST NATIONAL BANK OF KANSAS CITY, et al.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

Respondents St. Luke's Hospital of Kansas City, Kansas City Lutheran Home and Hospital Association, Baptist Memorial Hospital, and Independence Sanitarium and Hospital respectfully pray that the Petitions for a Writ of Certiorari to the Supreme Court of Missouri be denied.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTIONS PRESENTED

1. Whether the charitable trust created by the will of Homer McWilliams contains racial or religious limitations which are prohibited by the United States Constitution and invalidate the trust.

2. Whether the administration of the charitable trust created by the will of Homer McWilliams constitutes "state action", or private acts not subject to constitutional prohibitions.

STATEMENT OF THE CASE

The present case involves a suit for declaratory judgment and for instructions brought by the First National Bank of Kansas City, Missouri as Executor of the Estate of Homer McWilliams and the sole surviving designated trustee of a testamentary trust established by Mr. McWilliams in his Last Will and Testament. In its suit, the trustee sought a construction of that part of the will pertaining to the testamentary trust and instructions from the Court as to administration of the trust.

After being hospitalized in Trinity Lutheran Hospital, Kansas City, Missouri, for the last 18 years of his life, Homer McWilliams died on December 21, 1965 at the age of 98 years. In his will, executed November 16, 1934, as modified by its First Codicil thereto executed May 20, 1946, Mr. McWilliams provided that the vast majority of

his estate was to be held in trust for certain charitable purposes. After federal estate tax deductions and deducting certain specific bequests not here pertinent, the appraised net value of the assets turned over to the trustee on December 21, 1965 was $8,485,891.22. (Opinion of Supreme Court of Missouri, Appendix A to Petitioners' Brief at p. A2).[1]

The charitable trust was designated by Mr. McWilliams as the "McWilliams Memorial Hospital Trust" with the declared intent of the testator that the trust be in the memory of his parents. The relevant portions of the trust appear in Article XV of the Will as modified by the First Codicil and state:

> "All the rest, residue and remainder of my estate and property of every kind, nature and description and wheresoever situated, and whether now owned or hereafter acquired, I give, bequeath and devise unto my Trustees hereinafter named for the following uses, trust, and purposes, and upon the following terms and conditions:
>
> "The Trust Estate shall be known as the 'McWilliams Memorial Hospital Trust', in memory of my beloved Father and Mother, Sidney McWilliams and Fannie McWilliams. . . .
>
> "Subject to the payment of the bequests and sums given to respective persons herein named, I direct that the net income from the Trust Estate . . . be used annually by the Trustees and their successors in contributing to the maintenance and support of Protestant Christian Hospitals operated and maintained upon a nonprofit basis in the territory now constituting Jack-

1. References are to Petitioners' Brief in *Sutt* v. *The First National Bank of Kansas City*, No. 74-1279.

son County, Missouri, and not elsewhere, and/or in contributing to the maintenance, support and care of sick and infirm patients in said Hospitals, born of white parents in the United States of America." (5 Tr. 37-38)

In plaintiff's Petition, filed on May 21, 1969, as amended on June 18, 1970, plaintiff named as defendants the Attorney General of the State of Missouri, each hospital believed by plaintiff to be licensed and located in Jackson County, Missouri, and all known and unknown heirs of Homer McWilliams. In Count V of the Petition, the only one of six counts that is relevant here, plaintiff alleged that it was unable to construe that portion of the will hereinbefore quoted in order to determine which hospitals and/or patients qualify as beneficiaries of the trust established by Mr. McWilliams. (First Amended Petition, Appendix C to Petitioners' Brief at p. A54 *et seq.*).

The Attorney General of the State of Missouri, the known and unknown heirs of Homer McWilliams, and certain private hospitals not affiliated with any Protestant churches, respectively, asserted in the trial court and on appeal that the trust provisions were invalid for a number of reasons, including the assertion that the trust contained racial and religious limitations in violation of the Constitution of the United States, Amendments I and XIV. Those parties asserted, respectively, that the trust itself and its administration constituted "state action" within the meaning of the decisions of this Court, because of the following:

(a) Some of the discretionary beneficiaries of the trust are private hospitals subject to licensing, regulation, taxation and financing laws of the state and federal governments and serve a public function;

(b) The trustee of the trust is a national bank;

(c) The trustee sought interpretation of the will's provisions in the state court;

(d) The State's Attorney General has general supervisory power under state law over charitable trusts.

The known and unknown heirs of Homer McWilliams sought a failure of the trust because of the alleged invalidity of the trust provisions. The Attorney General of Missouri and the hospitals not affiliated with Protestant churches asserted that the alleged illegal and invalid provisions of the trust should be stricken and that the doctrine of *cy pres* should be applied to benefit all nonprofit hospitals in Jackson County, Missouri.

The trustee and these four respondent hospitals asserted the general validity of the trust and the lack of "state action" with regard to the trust or its administration.

The Supreme Court of Missouri found that the will of Homer McWilliams created a charitable trust with two identifiable classes of beneficiaries to which his trustee, in its sole discretion, is empowered to distribute the income from the trust estate. (Appendix A to Petitioners' Brief at p. A14). The first class are those nonprofit hospitals located in Jackson County, Missouri which have some relationship to and control by a Protestant Christian church; the second class are sick and infirm patients in those hospitals, born of white parents in the United States of America. (Appendix A at p. A14). The trial court found that these four respondent hospitals were the only hospitals located in Jackson County, Missouri which presently qualify as "Protestant Christian Hospitals" within

the meaning of Homer McWilliams' will. (Appendix B to Petitioners' Brief at p. A41, paragraph 2(c)).

The trial court and the Supreme Court of Missouri upheld the validity of the trust and found that no state action was involved in its administration. (See the Findings of Fact and Conclusions of Law and Judgment of the Trial Court, Appendix B, and Opinion of the Supreme Court, Appendix A, to the Petition).

REASONS FOR DENYING THE WRIT

Petitioners' Claim That "State Action" Exists in This Case Does Not Raise a Novel Question of Constitutional Law Not Previously Decided by This Court.

The Due Process clause of the Fourteenth Amendment pertains to action by a state. The question of whether the requisite "state action" is present, bringing into play the restrictions of the Fourteenth Amendment, has been decided by this Court in several prior decisions. The question of whether state action is found, is, therefore, not a novel question of constitutional law, and there is already substantial authority from this Court and from lower Federal Courts pertaining to this question. The most recent example is the decision by this Court in *Jackson* v. *Metropolitan Edison Company*, ... U.S. ....., 42 L.Ed.2d 477 (1974).

Although Petitioners have argued the merits of this question in their Petition at great length, the Petitioners' argument raises one question four ways: "Does the administration of Homer McWilliams' Trust constitute state action?" Each of the issues raised has been decided in prior cases.

First, Petitioners allege that state action is present because of the identity of some of the beneficiaries of the Trust. Those beneficiaries are private hospitals, privately owned and non-profit, who are subject to licensing and regulation by state government, who receive federal funds, and who also serve the public service of providing health and medical care to all members of the public. This Court has previously ruled that such extensive state contacts or regulations do not in and of themselves constitute state action. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176 *et seq.* (1972).

Secondly, Petitioners state that because the Trustee appointed by Homer McWilliams is a bank chartered under federal law, state action is involved. Although it is difficult to understand how the chartering of a bank under federal law constitutes *state action*, this Court has previously ruled that the act of licensing and regulating a corporation by the state government does not constitute state action. *Moose Lodge No. 107* v. *Irvis, supra.*

Third, Petitioners claim that because the Trustee has brought an action in state court to determine and construe the meaning of certain terms in the Last Will and Testament of Homer McWilliams, and obtained a judgment from the court accordingly, state action is satisfied through the intervention of the judicial branch of government. This Court has previously ruled that the mere application of state law by a court in interpreting or construing the terms of a will creating a charitable trust is a matter of state law and does not raise a significant federal question. *Evans* v. *Abney*, 396 U.S. 435 (1970); *see also, Lyeth* v. *Hoey*, 305 U.S. 188 (1938).

Fourth, Petitioners claim that because the Attorney General of Missouri is a party to this suit and has under state law general supervisory powers over charitable trusts,

state action is present through his participation in this litigation. This Court has previously ruled that the mere existence of a relationship between the alleged discriminatory conduct and state government does not constitute state action unless there is a symbiotic relationship between the state and the discriminatory conduct which makes the state a joint participant in the discriminatory conduct and places the imprimatur of the state on the discriminatory practices. *Jackson* v. *Metropolitan Edison Company, supra; Moose Lodge No. 107* v. *Irvis, supra; Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961).

Each of these four issues has been ruled upon in past decisions of this Court contrary to Petitioners' argument. This Court has also written about racial limitations in the context of the construction of wills creating private trusts for the benefit of charitable beneficiaries. *See, e.g., Evans* v. *Abney, supra; Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 353 U.S. 230 (1957) (The 'Girard College" case).[2]

The Decision of the Supreme Court of Missouri Is Consistent with Prior Decisions of the United States Supreme Court Involving the Question of Whether "State Action" Exists.

The Supreme Court of Missouri in its decision filed January 13, 1975 judiciously considered the question of whether state action was present, and in specific reliance on prior decisions of this Court, ruled that state action was not present. In making its decision, the Supreme Court relied upon the decisions of this Court in *Evans* v.

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2. State action must also be found to exist ("under color of any statute . . . of any state") in order to constitute a violation of the Civil Rights Act of 1871, 42 U.S.C. Section 1983. Petitioners' argument directed to the Fourteenth Amendment is applicable to this statute as well. *See, Jackson* v. *Metropolitan Edison Company, supra.*

Abney, supra; Moose Lodge No. 107 v. *Irvis, supra;* and *Jackson* v. *Metropolitan Edison Company, supra.* The decision by the Supreme Court of Missouri is consistent with those decisions.

The Construction of the Terms of the Last Will and Testament of Homer McWilliams Is Governed Solely by State Law, So That the Application of State Law to the Construction of a Will Does Not Involve a Federal Question.

The decision of the trial judge, the Honorable James A. Moore, of the Circuit Court of Missouri, Sixteenth Judicial Circuit, and the Supreme Court of Missouri, affirming the decision of the trial court, involved the application of neutral, non-discriminatory state laws governing the construction and interpretation of wills to the Last Will and Testament of Homer McWilliams. This included the meaning of the phrase "Protestant Christian Hospitals" as used in the Will. The construction and interpretation of a will is a matter of state law, *Lyeth* v. *Hoey, supra,* and does not involve a substantial federal question. *Evans* v. *Abney, supra.*

The Application by the Supreme Court of Missouri of Neutral Principles of State Law to the Last Will and Testament of Homer McWilliams Did Not Violate the First Amendment Because the Supreme Court Did Not Rule upon Ecclesiastical Questions.

Appellants allege violations of the First Amendment to the Constitution. This Amendment is made applicable to state action by virtue of the Fourteenth Amendment, and the question of whether or not state action exists in the first place has already been set forth in this brief.

Petitioners' contention that the First Amendment has been violated is without merit. This Court has expressly

ruled that judicial determinations involving religious institutions or questions do not violate the First Amendment where neutral principles of state law are applied and where the courts do not attempt to decide ecclesiastical questions of church doctrine or church law. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Watson* v. *Jones*, 13 Wall. 679, 20 L.Ed. 666 (1872); *Maryland and Virginia Aldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970).

The application by the Missouri courts of neutral principles of state law pertaining to the interpretation and construction of the Last Will and Testament of Homer McWilliams constitutes a "minimal and remote involvement" by the state that does not violate the principle of separation of church and state as set forth in the First Amendment. *See, Walz* v. *Tax Commission*, 397 U.S. 664, 676 (1970). *See also, Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *affirmed without decision sub nom., Coit* v. *Green*, 404 U.S. 997 (1971).

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of Missouri should, therefore, be denied.

Respectfully submitted,

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